

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C.

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MAY 14 1992

In re Application of)

FOUR JACKS BROADCASTING, INC.)

For a Construction Permit)
for a New Television Station)
on Channel 2 in)
Baltimore, Maryland)

FCC File NO. BPCT-910903KE

REC'D MASS MED BUS

MAY 15 1992

To: The Chief, Mass Media Bureau

VIDEO SERVICES

Federal Communications Commission
Office of the Secretary

OPPOSITION TO PETITION TO DISMISS

Four Jacks Broadcasting, Inc. ("Four Jacks"), by its attorneys, hereby submits its Opposition to the "Petition to Dismiss" filed on May 1, 1992 by Scripps Howard Broadcasting Company ("Scripps Howard") in the above-referenced proceeding. As demonstrated herein, the Scripps Howard petition is extremely untimely, misstates the governing facts, seriously misconstrues Commission case precedent and lacks any merit. Scripps Howard argues that the Four Jacks application contravenes the Commission's inconsistent application rule. However, under any test, the Four Jacks application is not an inconsistent application. Surely, Scripps Howard's counsel read the cases cited in its pleading and therefore must know that the petition to dismiss completely misstates the law in this area. Scripps Howard's apparent reason for filing the petition was to delay designation for hearing, so if any party is achieving a "private gain", as alleged in the Scripps Howard petition, it is Scripps

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Howard. For these reasons, the Petition to Dismiss should promptly be dismissed.

I. The Scripps Howard Pleading Is Extremely Untimely And There Is No Showing Of Good Cause For The Untimeliness

1. Four Jacks filed its application for Channel 2 in Baltimore, Maryland on September 3, 1991, and the Commission released a Public Notice establishing January 22, 1992 as the date for the filing of any petitions to deny the Four Jacks application. Although Scripps Howard filed a petition to deny on January 22, 1992, it was not until May 1, 1992 -- three months after the petition to deny date and eight months after the filing date -- that Scripps Howard first advanced the argument contained in its Petition to Dismiss. The gist of Scripps Howard's argument is that the Four Jacks application should not have been accepted for filing, yet Scripps Howard provides no justification whatsoever for its failure to raise this argument in a timely fashion at an earlier date if it felt the argument was important.

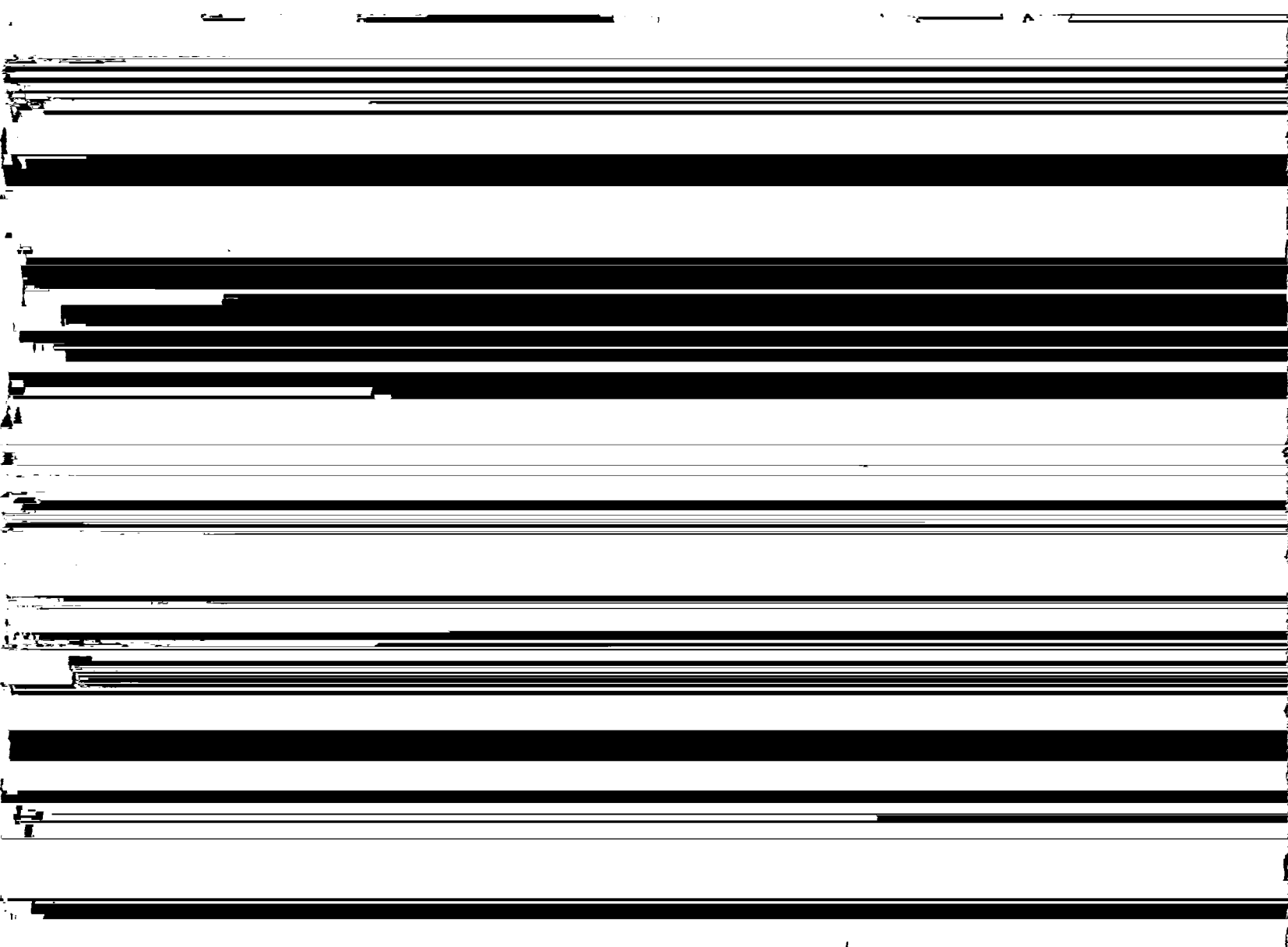
2. Moreover, Scripps Howard's suggestion that its pleading is timely under Section 73.3587^{1/} of the Commission's rules is without merit. Section 73.3587 sets forth procedures governing Informal Objections. The Scripps Howard pleading is not an Informal Objection. The Informal Objection rule is designed for the benefit of those parties who do not have standing to file a petition to deny. Here, Scripps Howard did file a petition to

^{1/} Section 73.3587 permits an Opposition but does not permit any Reply pleading. Therefore, upon the filing of this Opposition, the pleading cycle is complete.

deny and, certainly, the arguments advanced now should have been raised no later than the deadline for filing the petition to deny. Section 73.3587 is not designed to enable parties to delay proceedings by filing meritless pleadings many months late.

II. Scripps Howard Has Erroneously Interpreted
Section 73.3518 of the Commission's Rules

3. Scripps Howard contends that the acceptance of the Four Jacks application was improper because it purportedly violated Section 73.3518 of the Commission's rules at the time it was filed. It is Scripps Howard's position that the Four Jacks



5. Even if Four Jacks were the "same applicant," as construed by Section 73.3518, it is clear that that rule does not bar the licensee of a station from applying for another frequency in the community so long as the applicant proposes to divest the station it already owns. Attached hereto as Attachment A is a Memorandum dated January 13, 1984 prepared by a supervisory attorney in the FM Branch which states the following principle with respect to the Commission's contingent application policy:

. . . a commitment by an applicant to dispose of other station(s) -- not other pending CP applications -- does not constitute a violation of the rule, and can be dealt with by an appropriate divestiture condition in the HDO.

6. Scripps Howard simply does not understand the policies set forth in the very cases it cites. The principle established in the January 13, 1984 Commission memorandum has been upheld in a long line of cases. It is very clear that an applicant may apply for a new facility and propose to divest its interest in an existing facility. Since renewal applications can come due at any time, it would make no sense to refuse to accept a divestiture proposal simply because a license renewal application was pending. The license renewal application covers the very station the applicant is proposing to divest. Significantly, Scripps Howard cites no cases supporting its anomalous argument.

7. The cases Scripps Howard does cite actually support Four Jacks' position. Scripps Howard refers to Valley Broadcasting Co. (KVBC-TV), 58 RR2d 945 (1985); Comark

Corp., 2 FCC Rcd 3493 (1987). In Valley, the Commission stated
that ~~while the multiple membership rules supposedly prohibited an~~

Jacks application can thus be processed pursuant to Valley and

power on its existing frequency. The Commission's decision stated as follows:

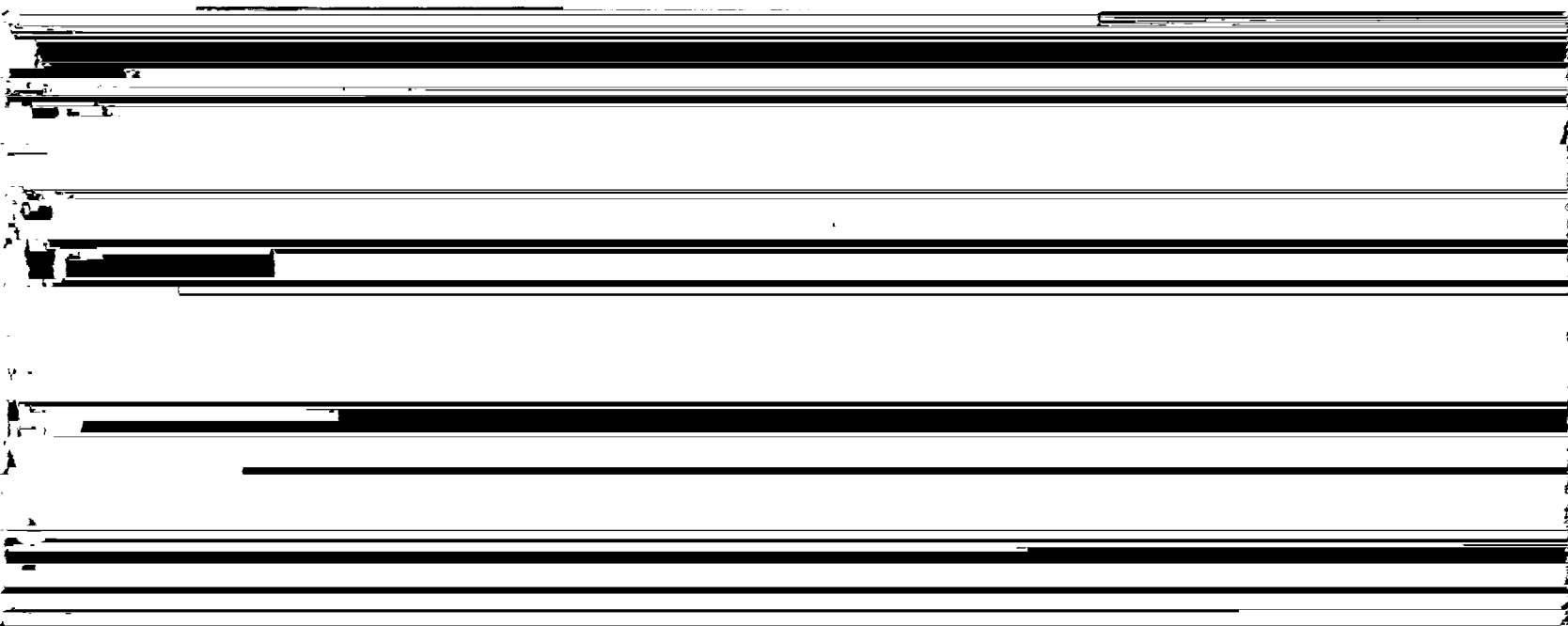
Although the Commission has held that prosecuting an application for renewal of license on one channel is not inconsistent with prosecuting an application for a construction permit to shift to another channel, Wabash Valley Broadcasting Corp. (WTHI-TV), 18 RR 562, 568, there is no question but that Atlantic's prosecution of its application to shift to WOL's frequency and make other changes is inconsistent with the prosecution of its application in hearing to increase power on its present frequency.

11. Atlantic thus involved two applications to upgrade one facility in mutually inconsistent ways. In contrast, this case does not involve two applications to upgrade Channel 45. Instead, it involves an application for a new facility on Channel 2 by Four Jacks, and Four Jacks' principals have proposed to divest their interests in Channel 45. It is immaterial that the license renewal application for Channel 45 was pending for a very short period of time after the Four Jacks application was filed. Scripps Howard's entire argument is premised on that portion of the Atlantic case in which the Commission addressed the issue of two applications to upgrade one facility and said that an applicant may not simultaneously apply to increase power on its present frequency and also apply for a change in the station's frequency. But those are different facts than the facts presented here, and Scripps Howard has ignored the Commission's clear holding in Atlantic that an application for renewal of license on one channel is not inconsistent with prosecuting an application to shift to another channel.

12. Scripps Howard similarly misconstrues Wabash Valley Broadcasting Co., supra. In that case the Commission held that an application by an existing station for renewal of its license for operation on Channel 10 was not inconsistent or conflicting with an application by the same licensee for operation on Channel 2 in the same community. The Commission stated that the inconsistent application rule "is applicable only to two or more applications for new or additional facilities . . ." 18 RR2d 562, 568.^{2/}

**III. Scripps Howard's Suggestion That The
Four Jacks Application Contravenes
Sound Public Policy Is Without Merit**

13. Scripps Howard's petition notes that "[t]he Commission does not preclude existing licensees from pursuing efforts to upgrade their facilities by operating on a superior channel" (Petition, p. 5) and suggests that Station WBFF(TV) should seek a better channel by way of an amendment. This argument makes no sense at all. As noted earlier, Station WBFF(TV) is licensed to Chesapeake Television Licensee, Inc. which is not the same entity

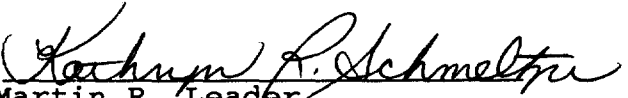


as Four Jacks. Furthermore, Station WBFF(TV) operates on UHF
Channel 45. Four Jacks is seeking a television facility on VHF

recognized as a ploy on the part of Scripps Howard to delay designation for hearing and should be promptly dismissed.

Respectfully submitted

FOUR JACKS BROADCASTING, INC.

By: 
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Dated: May 14, 1992

ATTACHMENT A

memorandum

DATE: January 13, 1984

REPLY TO
ATTN OF: Gordon Malick, Supervisory Attorney

SUBJECT: Contingent Applications - Ownership Rule Violations

TO: All FM Branch Attorneys, Specialists and Analysts

Attached hereto is a copy of the Division Chief's August 5, 1981 letter dismissing as inadvertently accepted for filing a mutually exclusive commercial FM application for construction permit for a new station at Grundy Center, Iowa, that would have violated Section 73.240(a)(2) - the regional concentration rule - because the 1 mv/m overlapped either an existing FM station or a pending FM CP application located within 100 miles and having common ownership.

This letter states the Commission's contingent application policy that we do not accept for filing and/or process any application predicated on the expectation of the denial of another application. This policy is equally applicable to violations of other aspects of the ownership

CERTIFICATE OF SERVICE

I, Sybil Briggs, hereby certify that I have this 14th day of May, 1992, mailed by first class United States mail, postage prepaid, copies of the foregoing "OPPOSITION TO PETITION TO DISMISS" to the following:

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*Hand Delivered